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**BUREAU OF WASTE PREVENTION
DIVISION OF PLANNING AND EVALUATION
BACKGROUND DOCUMENT AND TECHNICAL SUPPORT
FOR A PUBLIC HEARING
ON A REVISION TO THE
STATE IMPLEMENTATION PLAN FOR OZONE
AND
A REVISION TO 310 CMR 7.28
“NO_x Allowance Trading Program”**

Regulatory Authority:
MGL c. 111, Sections 142A through 142N

November 2004

This information is available in alternate format. Call Donald M. Gomes, ADA Coordinator at 617-556-1057. TDD Service - 1-800-298-2207.

DEP on the World Wide Web: <http://www.mass.gov/dep>

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**Background Document and Technical Support for a Revision to the Massachusetts State
Implementation Plan for Ozone, Including a Revision to 310 CMR 7.28 - “NO_x Allowance
Trading Program”
November 2004**

The Massachusetts Department of Environmental Protection (DEP or the “Department”) filed amendments to 310 Code of Massachusetts Regulations (CMR) 7.28, the Nitrogen Oxides (NO_x) Allowance Trading Program regulation, with the Massachusetts Secretary of State as an emergency regulation on November 4, 2004. These amendments were effective upon filing and were/will be published in the Massachusetts Register on November 19, 2004. In order to make the regulations permanent, the Department is now soliciting public comment on the regulation to comply with the public review process requirements of Massachusetts General Laws (MGL) Chapter 30A. The Department will hold a public hearing on the amendments on December X, 2004 and the deadline to submit public comments is December X, 2004.

I. Introduction

In November 1999, DEP promulgated a NO_x Allowance Trading Program, 310 CMR 7.28. This rule allocates 12,861 NO_x allowances to power plants and other large power generating sources in Massachusetts, as well as establishes set-asides for new units and energy efficiency and renewable projects. Under 310 CMR 7.28, facilities subject to the program receive NO_x allowances three years in advance of the year they can be used for compliance, based on historical output data. By November 30th of each year, pursuant to a federal requirement, facilities must have NO_x allowances equal to the total number of tons of NO_x emitted by their budget units during the year’s control period.

Over several years, due primarily to calculation errors, eighteen facilities received fewer NO_x allowances than intended over the control periods of 2004-2007. DEP filed an emergency regulation to address this deficiency by revising section 310 CMR 7.28(6)(b)4. to allocate NO_x allowances from the Public Benefit Set-Aside account to the eighteen facilities as listed in Table B of the attached emergency regulation. In order to promote accuracy in future allocations and provide for additional public input, DEP’s amended regulation adds a process for facilities to comment each year on that year’s allocations before DEP sends the allocation to the United States Environmental Protection Agency (EPA) to be recorded in the NO_x Allowance Tracking System maintained by EPA.

DEP is amending the regulation as part of a formal rulemaking process in accordance with MGL Chapter 30A. At this time, DEP solicits comments only on the provisions put forth in this document, and not on other provisions of 310 CMR 7.28. Once comments are received, DEP will prepare and issue final regulations along with responses to all relevant comments received during the comment period.

Upon finalization of the amendments to 310 CMR 7.28, DEP will submit the amendments to EPA as revisions to the Massachusetts State Implementation Plan (SIP).

II. Emergency Revision to 310 CMR 7.28

A. Background of 310 CMR 7.28

In November 1999, DEP submitted a SIP revision to EPA in order to fulfill its obligations under EPA's NO_x SIP Call (63 FR 61712, October 10, 1997), and its commitments under the Ozone Transport Commission (OTC) NO_x Memorandum of Understanding (MOU). The OTC NO_x MOU was adopted in 1994, and established a two-phased trading program to reduce NO_x emissions from large fossil fuel-fired boilers, combustion turbines and indirect heat exchangers through a regional allowance trading program. 310 CMR 7.28, the NO_x Allowance Trading Program, implements the third phase of the OTC NO_x MOU, with a tighter ozone season cap which took effect in Summer 2003. The Massachusetts program sets the ozone season state cap on NO_x emissions from affected facilities at 12,861 tons. Under 310 CMR 7.28, Massachusetts allocates 90% of the state cap (i.e., 11,575 allowances) to existing facilities on the basis of historical net electrical and thermal output, encouraging efficiency and pollution prevention in the power generation sector. An additional 5% of the state cap (i.e., 643 allowances) is set aside to be allocated to new units for the three years after which they come on-line but before they receive allowances from the pool reserved for existing units. The remaining 5% of the state budget (i.e., 643 allowances) is reserved for Public Benefit Set-Aside (PBSA) applicants implementing Energy Efficiency Projects (EEPs) and Renewable Energy Projects (REPs). For more information on 310 CMR 7.28, see the July 1999 *Background Document and Technical Support for Public Hearings on Proposed Revisions to the State Implementation Plan For Ozone: Response to the "NO_x SIP Call" and the "OTC NO_x MOU," Including Amendments to 310 CMR 7.00 Et Seq.: 310 CMR 7.19 "RACT for Sources of Oxides of Nitrogen," 310 CMR 7.27 "NO_x Allowance Program," and 310 CMR 7.28 "NO_x Allowance Trading Program."*

In September 2000, DEP finalized minor revisions to 310 CMR 7.28 to address a seven allowance deficiency in the allocation for three municipal power companies for the first three control periods of the program (2003-2005). Table A was added to the regulation to implement this change. For more information on this revision, see the April 2000 *Background Document and Technical Support For a Public Hearing On a Proposed Revision To the State Implementation Plan For Ozone and a Proposed Revision to 310 CMR 7.28 "NO_x Allowance Trading Program."*

In July 2004, DEP amended the NO_x Allowance Trading Program, 310 CMR 7.28(6)(b), to implement the PBSA program by defining eligible renewable and energy efficiency projects and establishing the process for the submission of requests for PBSA allowances. For more information on the PBSA program, see the March 26, 2003 *Background Document and Technical Support For Public Hearings on Proposed Amendments to 310 CMR 7.00 Et Seq.: 310 CMR 7.28 "NO_x Allowance Trading Program"* and June 2004 *Summary of Comments and Response to Comments on Proposed Amendments to 310 CMR 7.28 NO_x Allowance Trading Program to establish the Public Benefit Set-Aside Allocation Process and Proposed Revisions to the State Implementation Plan for Ozone.*

B. Distribution of PBSA Allowances

By September 2004, DEP received several applications from qualifying Energy Efficiency and Renewable Energy Projects for 2003 and 2004 PBSA allowances. DEP approved eligible applications and allocated ninety-six (96) 2003 and two hundred and eight (208) 2004 PBSA allowances.

Of the total six hundred and forty three (643) 2003 PBSA allowances, ninety-six (96) were allocated to qualifying projects; seven (7) went to the facilities listed in Table A; one hundred and ninety (190) went to new units due to oversubscription of the 2003 New Unit Set-Aside (NUSA); and one (1) went to one existing unit due to the original 2003 allocation having distributed 1 more allowance than 90% of the state-wide budget, leaving a total of three hundred and forty-nine (349) 2003 PBSA allowances not yet distributed.

Of the total six hundred and forty three (643) 2004 PBSA allowances, two hundred and eight (208) were allocated to qualifying projects; seven (7) went to the facilities listed in Table A; and one (1) went to one existing unit due to the original 2004 allocation having distributed 1 more allowance than 90% of the state-wide budget, leaving a total of four hundred and twenty-seven (427) 2004 PBSA allowances not yet distributed.

C. Description of Issue and Emergency Revisions to 310 CMR 7.28

Allocating Additional Allowances

Recently DEP discovered various discrepancies in the 2004, 2005, 2006 and 2007 allocation files. The problems are the result of a variety of issues including errors in data entry and data submittals, errors in calculations, and the incorrect application of the regulations by DEP staff and facilities.

On September 15, 2004, DEP sent each company in the program: a spreadsheet showing the data calculations used to determine corrected 2004-2007 allocations for each facility owned by that company; DEP's procedure for calculating these allocations; and a chart indicating the number of allowances the facility was allocated, a corrected allocation, and the difference between the two. On September 30, 2004, DEP held an information meeting with NOx Budget facilities and other interested parties to discuss the discrepancies in the 2004-2007 allocations, possible options to correct the allocations, and proposed methods for ensuring accuracy in future allocations. Based on comments received at the meeting and following the meeting, DEP proposed to allocate 2003, 2004 and 2005 PBSA NOx allowances to the facilities that did not receive enough allowances in the 2004-2007 allocations.

On October 28, 2004, DEP held a second public meeting to communicate its proposal and receive informal comments on a proposed draft emergency regulation. The proposal was well-received, with no one opposing the Department's general approach for addressing the allocation of allowances to facilities that received too many or too few allowances, as described below.

DEP has filed emergency revisions to 310 CMR 7.28 that provide 955 PBSA allowances to the facilities that did not receive enough allowances for the 2004-2007 allocations. Please see Attachment A for the amendments to 310 CMR 7.28. The amendments add Table B to 310 CMR 7.28(6)(b). Table B identifies the eighteen facilities that will receive the allowances and the number of 2003, 2004 and 2005 PBSA allowances they will receive. DEP is using three hundred and forty-nine (349) 2003 and four hundred and twenty-seven (427) 2004 PBSA allowances for a total of seven hundred and seventy-six (776) 2003 and 2004 allowances. Because DEP needs an additional 179 allowances to cover the remainder of the allowances (i.e., 955-776), DEP must use one hundred and seventy-nine (179) 2005 PBSA allowances. Although the deadline for qualifying EE and RE projects to apply for 2005 PBSA allowances will not occur until April 1, 2005, there will be four hundred and sixty-four (464) 2005 PBSA allowances remaining after the Table B allocation and DEP estimates that will be sufficient to cover the anticipated volume of 2005 PBSA applications from qualified projects. In addition, there may be more 2005 allowances available to PBSA applicants from the NUSA account if the 2005 NUSA account is undersubscribed and the 2005 PBSA account is oversubscribed.

Based on comments received from the facilities, DEP also decided that it was not fair to require facilities that received too many allowances to return those allowances. This decision was based on the fact that the facilities received these allowances over the last three years, expected that the allocations they received were final allocations, and in some cases had already sold the allowances. To clearly address this issue, the draft regulation states that there will be no further changes to the existing budget units' NOx allowance allocations for the 2004-2007 control periods.

The table below outlines the distribution of the 12,861 NOx allowances allocated to Massachusetts each year under 310 CMR 7.28 and the number of allowances that remain in each account after implementation of these emergency revisions to the regulation.

Year	Allocation Account	Initial Amount	Type of Allocation	Amount Allocated	Amount Remaining
2003	Existing Unit	11,575	Existing Units	11,285	0
			Table I	290	
	New Unit Set-Aside	643	New Units	643	0
	Public Benefit Set-Aside	643	*Error - 2003 Existing	1	0
			Table A	7	
			PBSA Applications	96	
			NUSA 2003 overage	190	
			Table B	349	
2004	Existing Unit	11,575	Existing Units	11,285	0
			Table I	290	
	New Unit Set-Aside	643	New Units	617	26
	Public Benefit Set-Aside	643	*Error - 2004 Existing	1	0
			Table A	7	
			PBSA Applications	208	
2005	Existing Unit	11,575	Existing Units	11,285	0
			Table I	290	
	New Unit Set-Aside	643	New Units	0	643
	Public Benefit Set-Aside	643	PBSA Applications	0	464**
			Table B	179	
2006	Existing Unit	11,575	Existing Units	11,575	0
	New Unit Set-Aside	643	New Units	0	643
	Public Benefit Set-Aside	643	PBSA Applications	0	643
2007	Existing Unit	11,575	Existing Units	11,575	0
	New Unit Set-Aside	643	New Units	0	643
	Public Benefit Set-Aside	643	PBSA Applications	0	643

* In 2003 and 2004 the existing units were allocated 11,576 allowances instead of 11,575.

** The 2005 Table A allocation was mistakenly taken from the Existing Unit Account. This error is being corrected through Table B of these emergency revisions to the regulation.

Ensuring Accuracy in Future Allocations

In order to ensure accuracy in future allocations, the amended regulation includes a more transparent allocation process that allows facilities to review DEP's allocations before the final allocation is sent to EPA. Beginning with the allocation for the 2008 control period, which occurs in the spring of 2005, DEP will provide a template for the facilities to fill in their net electrical and steam output data. With the information from the template, DEP will calculate the allocation and make the complete allocation publicly available for review by affected facilities. Facilities will have an opportunity to comment on whether their output data was correct and/or DEP made any errors in the allocation. If necessary, based on comments received, DEP would correct the allocation, allow facilities to review any corrected allocation, and then forward a final allocation to EPA and facilities.

This more transparent allocation process is set forth in the amendments to 310 CMR 7.28(6)(d)4.

Clarifying Existing Regulatory Language

In reviewing the errors made in the 2004-2007 allocations, and in light of experience gained with the many new units that have come on-line in Massachusetts in the last five years, DEP found that a particular regulatory provision at 310 CMR 7.28(6)(d)2.a. was not sufficiently clear. Specifically, DEP found that the term “nameplate capacity” did not clearly explain how to apply the calculation in this section of the regulation to various new unit configurations of combustion turbines, steam turbines and generators. Allocation under the NOx Budget regulation is based on useful output (net electrical and/or useful thermal output), and therefore the nameplate capacity used in the calculations in this section should reflect the portion of the budget unit’s configuration that contributes to useful output. To make this principle clear, DEP’s emergency regulation added new language after the formulae in this section of the regulation, as follows.

For purposes of this section, the nameplate capacity to be used in the calculation of AEO or ASO shall represent the portion of the budget unit configuration contributing to generation of electrical output or useful steam output by the end of the control period. Such nameplate capacity shall have been established in a 310 CMR 7.02 plan approval or otherwise determined by the Department. A budget unit or portion thereof that does not generate electricity or useful steam output by the end of the control period shall not be included in the calculation of AEO or ASO.

Some alternative clarifying language has been suggested to the Department, a version of which we provide here for review and comment, as follows.

For purposes of this section, “nameplate capacity” means the generation capacity of the portion of the budget unit configuration that, by the end of the control period, had contributed to generation of electrical output or useful steam output. Such nameplate capacity may have been established in a 310 CMR 7.02 plan approval or may otherwise be determined by the Department. A budget unit or portion thereof that does not generate electricity or useful steam output by the end of the control period shall not be included in the calculation of AEO or ASO.

DEP believes that it would be useful to explain how clarifying language will be implemented for new budget units that might be constructed in Massachusetts in the future. Please see Attachment B for a table outlining the method that DEP will use to determine the nameplate capacity for various new unit configurations.

Please see Attachment C for the calculations that support the allocations listed in Table B of the emergency revisions.

III. Request For Comments

DEP requests comments on the relative merits of the emergency amendments. In particular, DEP requests comment on:

- Whether DEP should allocate Public Benefit Set-Aside allowances to the affected facilities listed in Table B.
- Whether, and how, DEP should provide an opportunity for facilities to comment on future draft allocations before they are finalized.
- Whether, and how, DEP should clarify in the regulation that new units that operate for less than one full ozone season will only receive allowances for the nameplate capacity of the units generating electricity or useful thermal output before the end of the ozone season. If a commenter has concerns with this provision, please provide alternative wording.

DEP is not opening any other section of 310 CMR 7.28 for revision.

IV. Environmental Impacts

There will not be any environmental impacts from the amendments to the NO_x Allowance Trading Program because the amendments will not increase the summertime state-wide NO_x allowance cap. The allowances allocated to the “under-allocated” facilities are PBSA allowances that have not been allocated to PBSA applicants.

V. Agricultural Impacts

Pursuant to the intent of Massachusetts General Law, Chapter 30A, Section 18, state agencies must evaluate the impact of proposed programs on agriculture within the Commonwealth. The amended regulation to the NO_x Allowance Trading Program is not expected to have any impact on agricultural activities in Massachusetts.

VI. Impact on Massachusetts Municipalities, Proposition 2½

The amended regulation to 310 CMR 7.28 affects eighteen power generation facilities. Under the amended regulation, these facilities will receive allowances that they should have received under 310 CMR 7.28 for the 2004-2007 control periods. The amended regulation has no substantial effect on Massachusetts’ municipalities.

VII. Massachusetts Environmental Protection Act (MEPA)

The amended regulation is “categorically exempt” from the “Regulations Governing the Preparation of Environmental Impact Reports,” 301 CMR 11.00, because the amended regulation does not meet or exceed one or more MEPA review thresholds.

VIII. Impacts on Other Programs

Since the amended regulation is a minor revision in response primarily to calculation errors, there is no impact of this amended regulation on other programs such as Toxics Use Reduction or Air Toxics.

IX. Public Participation

On November 4, 2004, DEP filed amendments to 310 CMR 7.28 as an emergency regulation in accordance with MGL c. 30A, § 2. The amendments became effective on the day of filing with the Secretary of the Commonwealth. In order for the emergency regulation to remain in effect, DEP must give notice, hold a public hearing and file a notice of compliance with the Secretary of the Commonwealth within 90 days of filing the emergency regulation. After receipt of any public comments, DEP will evaluate and respond to such comments, prior to filing a notice of compliance with the Secretary of the Commonwealth. The final regulation will also be submitted to EPA as a revision to the Massachusetts SIP for ozone.

At this time and in accordance with MGL c. 30A, § 2, DEP must give notice of and provide the public the opportunity to review background and technical information for at least 21 days prior to proposing revisions at a public hearing. However, to assure more adequate notice for processing a revision to the SIP and to comply with EPA notice requirements, a formal notice must be issued 30 days before a public hearing.

A public hearing to collect comments on the SIP revision, including the amendments to the NOx Allowance Trading Program, 310 CMR 7.28, will be conducted under the provisions of MGL Chapter 30A on:

Tuesday, January 4, 2005
10:00 a.m.
DEP - Boston Office
2nd Floor Conference Room A
One Winter Street
Boston, MA

Testimony may be presented orally or in writing at the public hearings. Written comments will be accepted until 5:00 p.m. on January 4, 2005. Please submit comments to:

Sharon Weber
Department of Environmental Protection
37 Shattuck Street
Lawrence, MA 01843-1398
Attention: 7.28 Revision

If possible, please e-mail a copy to sharon.weber@state.ma.us

To ensure that your written comments are included in the hearing docket, please make sure that you address your comments to Sharon Weber. Comments sent to other offices may not be received in time to be included in the official docket.

If there are any questions regarding this document, please contact Sharon Weber (978-975-1138 x343).

Attachment A. Emergency Revisions to 310 CMR 7.28

**Amend 310 CMR 7.28(6)(b)4. to add:
(Make existing language (6)(b)4.a.)**

4. Limited Allocation from Public Benefit Set-Aside to Existing Budget Units.

a. For each of the three control periods of 2003 through 2005 only, the budget units in Table A will receive the allocations listed in the table from the public benefit set-aside.

310 CMR 7.28(6)(b)4.a. TABLE A Partial NO _x Allowance Allocation from the Public Benefit Set-Aside for 2003 - 2005		
NAME	ORIS Code	Allowance Allocation
Braintree	01660	3
Peabody	01658	1
Taunton	01682	3

(Add new language as (6)(b)4.b.)

b. On November 4, 2004 the facilities in Table B will receive the allocation listed in the table from the public benefit set-aside account.

310 CMR 7.28(6)(b)4.b. TABLE B NO _x Allowance Allocation from the Public Benefit Set-Aside for 2003 – 2005				
NAME	ORIS Code	2003 Allowance Allocation	2004 Allowance Allocation	2005 Allowance Allocation
ANP Blackstone	55212	181	222	93
Brayton Point	1619	75	91	38
New Boston	1589	42	51	21
Mystic	1588	14	16	7
Bellingham Cogen	10307	12	15	6
Stony Brook	6081	7	8	4
Salem Harbor	1626	7	8	3
Waters River	1678	2	3	1
Masspower	10726	2	2	1
Kneeland	880023	1	2	1
Pittsfield	50002	1	2	1
Lowell Power	54586	1	1	1
Mount Tom	1606	1	1	1
Somerset	1613	1	1	1
Dartmouth	52026	1	1	0

Fore River	55317	1	1	0
Blackstone Street	1594	0	1	0
Dighton	55026	0	1	0

There will be no further changes to the existing budget units' NOx allowance allocations for the 2004-2007 control periods.

Amend 310 CMR 7.28(6)(d) to add 4.:

4. Beginning with the allocation for the 2008 control period, which occurs in the Spring of 2005, and for each control period thereafter, the Department will forward a template to be used by the budget units for submitting control period output data. After receiving output data from the budget units, the Department will calculate the allocation for the particular control period and forward a draft spreadsheet containing all of the budget units' allocations, including output data and calculations, to the budget units. There will be a 30-day comment period during which budget units may notify the Department of any errors in the output data and the calculation of the allocations contained in the spreadsheet. If the Department receives any comments and makes revisions to the spreadsheet, then it will provide a 10-day comment period on the revised spreadsheet. The Department will post the final allocation on the Department website and send it to EPA and budget units by April 1 of each year, three years before the control period for which the allowances are first useable.

Amend 310 CMR 7.28(6)(d)2.a. to add new language after existing language:

[Existing formulae in regulation

a. For budget units with less than one full control period of operation:

*AEO(y) = (greater of actual capacity utilization in percent or 0.9) * 3672 h *
(nameplate capacity of the budget unit in MWh)*

*ASO(y) = (greater of actual capacity utilization in percent or 0.9) * 3672 h *
(nameplate capacity of the budget unit in MMBtu/h)]*

New language to be added after existing formulae:

For purposes of this section, the nameplate capacity to be used in the calculation of AEO or ASO shall represent the portion of the budget unit configuration contributing to generation of electrical output or useful steam output by the end of the control period. Such nameplate capacity shall have been established in a 310 CMR 7.02 plan approval or otherwise determined by the Department. A budget unit or portion thereof that does not generate electricity or useful steam output by the end of the control period shall not be included in the calculation of AEO or ASO.

Attachment B. Guideline for Determining Nameplate Capacity of New Units

This table is intended to be a guide for determining the nameplate capacity to be used in 310 CMR 7.28(6)(d)2.a., based on facility configurations that have been constructed in Massachusetts.

Configuration	Determination of Nameplate Capacity
Simple cycle combustion turbine (CT):	
a single CT serving a single generator	Use nameplate capacity of the CT generator if it started to generate electricity during the ozone season
multiple CTs serving a single generator	Use the portion of the nameplate capacity of the CT generator represented by each CT that started to generate electricity during the ozone season
Combined cycle, non-cogeneration:	
a CT serving a generator, plus a steam turbine (ST) serving a separate generator	Use nameplate capacity of the CT generator if it started to generate electricity during the ozone season, plus nameplate capacity of the ST generator if it generated electricity by the end of the ozone season
a CT serving a generator, plus a ST serving the same generator	Use nominal capacity of the CT if it started to generate electricity during the ozone season, plus nominal capacity of the ST if it contributed to electricity generation by the end of the ozone season
multiple CTs serving their own generators, plus a shared ST serving a separate generator	Use nameplate capacity of each CT generator that started to generate electricity during the ozone season, plus the portion of the ST generator nameplate capacity represented by each CT generator that started to generate electricity during the ozone season, if the ST generator generated electricity by the end of the ozone season
Combined cycle, cogeneration: a new CT serving a generator, plus existing STs serving existing generators, plus generation of useful steam output	Use nameplate capacity of the CT generator if it started to generate electricity during the ozone season, plus increased capacity of the existing ST generators if they received steam from the new CT by the end of the ozone season, plus useful steam output from the new CT